



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/167944

PRELIMINARY RECITALS

Pursuant to a petition filed August 11, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Office of the Inspector General in regard to FoodShare benefits (FS), a hearing was held on September 22, 2015, at Green Bay, Wisconsin.

The issue for determination is whether the Department erred in terminating FS benefits and sanctioning petitioner for one year from the FS program for an IPV based on a finding of guilt of a county ordinance for program fraud.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

|

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]

Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Brown County.

2. The Brown County Sheriff investigated petitioner for allegedly using her FS benefits to pay “tabs” that she had accumulated at [REDACTED] and [REDACTED]; in effect, petitioner was possibly paying for food at some point in time after it was purchased, or was otherwise applying her FS benefits to pay unknown debts or transfer funds at this store. Law enforcement and the Department also suspected that fees or interest for loans may have been paid to the stores from EBT cards.
3. On March 4, 2015, the Brown County Sheriff’s office sent petitioner a summons to appear in court regarding Citation No. [REDACTED]. Respondent’s Exhibit 1. The violation description was cited as “Fraud in Public Assistance.” *Id.*
4. A bench trial was held on April 29, 2015, and petitioner was found guilty of an ordinance violation under section 30.05(2) of the Brown County Code. Respondent’s Exhibit 3. Petitioner did not appear, but was represented by counsel at the bench trial. A police report and other documents in the record, see exhibit #2, reflect the allegations and evidence presented in the bench trial in Brown County.
5. On May 14, 2015, the respondent sent notice to petitioner informing her that because of the finding of guilt in the circuit court it would impose an IPV and a 12 month sanction.
6. Petitioner appealed the FoodShare Notice of Disqualification on August 11, 2015.

DISCUSSION

The process of imposing an IPV is detailed in the Code of Federal Regulations at 7 CFR 273.16. The Federal regulations provide for an imposition of an IPV through several mechanisms. An agency may initiate an administrative disqualification hearing (see 7 CFR 273.16(e)); or by waiver (see 7 CFR 273.16(f)). But, an IPV may also be based on a civil or criminal court action establishing the facts supporting the IPV in a court of appropriate jurisdiction. See 7 CFR 273.16(g). The Federal rule state “[t]he State agency should conduct administrative disqualification hearings in cases in which the State agency believes the facts of the individual case do not warrant civil or criminal prosecution through the appropriate court system....” 7 CFR 273.16(a).

In this case, the FS agency and the prosecuting authority proceeded with a prosecution of this matter as a civil forfeiture matter as a violation of Wisconsin Statute § 30.05(2). Petitioner did not personally appear at the bench trial, but was represented by counsel who appeared on her behalf. The court found petitioner guilty of violating section 30.05(2) of the Brown County Code, entitled Prohibiting Fraud in Public Assistance, Housing Accommodations, and Energy Assistance Cases and states that “no person shall willfully do any act designed to interfere with the proper administration of the public assistance program, dwelling accommodation program, or energy assistance program.”

The Federal rule also allows for the agency’s imposition of an IPV after a finding of guilt by a court:

(7) If a court fails to impose a disqualification or a disqualification period for any intentional program violation, the State agency shall impose the appropriate disqualification penalty specified in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section unless it is contrary to the court order.

7 CFR 273.16(a)(7), see also § 273.16(g)(2).

Petitioner’s representative argued at hearing, and in his written submission (ex. #3) that the ordinance under which petitioner was convicted is does not specify any of the grounds establishing that the

petitioner committed an IPV and that the record does not otherwise demonstrate that her conduct constitutes an IPV.

The Brown County Circuit Court determined, in a written order dated June 4, 2015, that the petitioner was found guilty of violating section 30.05(2) of the Brown County Code. As such, the Circuit Court determined that the petitioner willfully acted to interfere with the proper administration of the public assistance program. Again, this determination was reached after a bench trial where petitioner appeared by counsel.

The petitioner also argued that a conviction under section 30.05(2) of the Brown County Code does not equate to an IPV. An IPV is defined as follows:

Definition of intentional Program violation. Intentional Program violations shall consist of having intentionally:

(1) Made a false or misleading statement, or misrepresented, concealed or withheld facts; or

(2) Committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).

7 C.F.R. 273.16(c).

The record establishes petitioner's conviction for willfully acting to interfere with the proper administration of the public assistance program. The Department representative testified at this administrative hearing that she was a witness in the court trial in Brown County and that she testified regarding the facts alleged in the police report. She also testified that other law enforcement witnesses testified regarding the police report and the allegations therein. This testimony and documentation establishes that the conviction pertained to the FS public assistance program. Petitioner's counsel did not argue that it does not, only that the police report should not be used to form the basis of a finding of fact as it is hearsay.

As for this argument, counsel suggested that the rule in Wisconsin pertaining to the bar of hearsay as the basis for a finding of fact in an administrative proceeding does not require that the petitioner dispute such fact at hearing. Counsel maintained that the two on-point and controlling cases do not require this. This is not correct and, at best, the question has not been answered with a firm holding. In the most recent discussion on this topic, the Court of Appeals observed:

*The Housing Authority argues, unconvincingly, that **Gehin** does not apply because it stands for the proposition that only controverted hearsay is insufficient to constitute substantial evidence, and here, the hearsay is uncontroverted. Indeed, **Gehin** does seem to limit its holding to controverted evidence; however, the Housing Authority's assertion that "Williams did not dispute that she made such threats" is belied by the record. In her testimony before the Housing Authority, Williams explicitly denied slapping, hitting, or pushing Koceja, stating "I did not slap her. I did not hit her. I didn't push her out of my way." To the extent she did not explicitly deny threatening Koceja, she certainly implied that she did not threaten her when she omitted those facts from her step-by-step description of the incident. Further, when recalling her reactions to receiving the citations in the mail (she had left the restaurant by the time the police*

arrived) Williams testified that her first thoughts were: "I'm innocent[;] I'm going to dispute these charges." Through this testimony, Williams controverted the double-hearsay report that she threatened Koceja or engaged in violence against her. Therefore, Gehin applies.

Williams v. Housing Authority, 2010 WI App 14. There remains the fact that petitioner did take the matter to a bench trial in Brown County and whether this could constitute disputing the facts in the instant proceeding. But, in the end it simply does not matter because the use of the police report in this matter does not constitute hearsay at all.

Hearsay is defined in Wisconsin as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove *the truth of the matter asserted*." Wis. Stat. § 908.01(3) (emphasis added). Law students undergo countless hypotheticals to help illustrate the significance of those last six words. In this case, the criminal complaint and other evidence in exhibit #2 is being used by the Department, and by this ALJ, as a means of demonstrating the factual basis for the ordinance violation and conviction. It is not being offered to prove the truth of the matter asserted therein, that petitioner engaged in that conduct. That has already been determined after a bench trial in Brown County. It does not matter whether the allegations are true – what matters in the instant case is whether petitioner was found guilty (she was) and whether the alleged conduct constitutes an IPV, which it does. This ALJ's use of that police report to establish what was alleged and found is not a use of hearsay. Petitioner's counsel did not allege that she was not convicted of the violation and did not allege that there was a conviction for other conduct. There is no credible argument that petitioner was convicted of anything else on this record.

Additionally, the Department representative was involved in the investigation and was a witness at the trial. Even without the police report, [REDACTED]'s testimony established that the allegations in the trial were of conduct that would constitute an IPV.

CONCLUSIONS OF LAW

The Department did not err in termination petitioner's FS as the IPV has been established in the circuit court.

THEREFORE, it is

ORDERED

That this matter is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

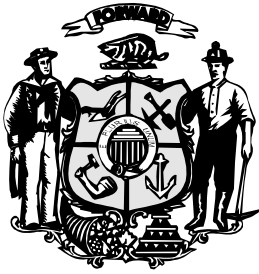
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 24th day of September, 2015

\s\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



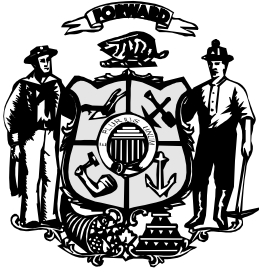
State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on September 24, 2015.

Office of the Inspector General
Division of Health Care Access and Accountability



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 7, 2015.

Attorney Harold Menendez